

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 317

HANS LUDWIG BENZIAN, PETITIONER

v.

SAUL GODWIN, CHAIRMAN, AND IRVING J. HESS,
LEONARD E. SCHWALBE, IRVING SABSEVITZ AND
CLIFFORD N. OWEN, MEMBERS OF LOCAL BOARD
No. 65, MANHATTAN, CITY AND STATE OF NEW
YORK, UNITED STATES SELECTIVE SERVICE
SYSTEM

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the respondents, moves that this Court dismiss the petition for a writ of certiorari on the ground that the cause has abated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

System, on May 29, 1947." (Appendix, *infra*, p. 8.)

There is no connecting link between the Local Boards created under the Selective Service Act of 1940, and those now in existence. The latter Boards were created under the Selective Service Act of 1948, Pub. 759, 80th Cong., 2nd sess., more than a year after the demise of the Boards under the 1940 Act, and are completely different from those Boards, having no authority to deal in any way with registrants under the Act of 1940. We have been informally advised that under the 1948 Act, there is no Local Board No. 65 in Manhattan, New York County. There is, however, a Local Board No. 65 established under that Act, which Board is located in Queens County. Moreover, of the five respondents named in this case, only two have been reappointed to serve under the Selective Service System established under the 1948 Act, and they are members of Local Board No. 17, Manhattan, New York County.

2. No other agency has succeeded to the functions of Local Board No. 65. We do not believe that the Act of March 31, 1947, Pub. L. No. 26, 80th Cong., 1st Sess., relating to liquidation of the Selective Service System, operates to keep the instant proceeding alive. That Act established an Office of Selective Service Records the first of whose functions was "to liquidate the Selective Service System, which liquidation shall be completed as rapidly as possible after March 31,

1947, but in any event not later than March 31, 1948 * * *” (Section 2 (a)), and provided for the transfer of “all property, records, and personnel of the Selective Service System” to the Office of Selective Service Records (Section 4).² Nothing in this Act even suggests that the Office of Selective Service Records was to assume any liability of the local Boards. But whatever the effect of that Act on the operation of the Selective Service System, the fact remains that all Local Board members, including those here involved, ceased to operate as such shortly thereafter.

Thus, even if this proceeding could have been continued under the Act of March 31, 1947, and someone could have been substituted for the local Board members, it is clear on the face of the record in this case that petitioner did not move to substitute anyone within six months, as required by 28 U. S. C. 780, and hence failed to prevent the suit from abating. Indeed, so far as appears from the record, petitioner has never made any such motion.

The fact that 28 U. S. C. 780 was omitted from the revised Title 28 of the United States Code (H. Rep. No. 308, 80th Cong., 1st sess. A. 239) does not aid petitioner, since the time for so moving had long since expired on September 1,

² With respect to the transfer of the functions of the Office of Selective Service Records to the new Selective Service System, see Sec. 10 (a) (4) of Pub. L. No. 759, 80th Cong., 2d sess.

1948, the date on which that revision became effective. Moreover, Section 780 was omitted from the revised Title 28 for the stated reason that the same ground is covered by Rules 25 and 81 of the Federal Rules of Civil Procedure. In this connection, it may be noted that while Rule 25 pertains only to the District Court, the cause was in the District Court for more than six months after respondents' service with the Selective Service System had terminated, without petitioner making any motion to substitute (R. 2). See also Rule 19 (4) of the Rules of this Court, making 28 U. S. C. 780 applicable to proceedings in this Court.

3. If the Court feels that the petition should not be dismissed on the ground that the cause has abated and that it should be considered on its merits, the Government requests that it be given an opportunity to file a further brief in reply to the petition.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

APPENDIX

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM,
1712 G STREET NORTHWEST,
Washington 25, D. C., October 27, 1948.

1-26-1

The Honorable THE ATTORNEY GENERAL

Subject: Benzian v. Sol Godwin, Chairman,
Irving J. Hess, et al., Members of
Local Board No. 65, New York
County, New York. U. S. Supreme
Court No. 317

MY DEAR MR. ATTORNEY GENERAL: Pursuant to a telephone request from your office, I enclose herewith a signed copy of Liquidation Order No. 1, issued by me on March 28, 1947 and a sample of the Certificate of Service which was issued to all local board members upon the termination of their service in such capacity. This certificate was issued by the Selective Service System and signed by the President of the United States, the Director and State Director of the Selective Service System and the Governor of the State in which uncompensated service was rendered during the existence and operations of the Selective Service System under the Selective Training and Service Act of 1940, as amended.

All local boards of the Selective Service System

established under the Selective Training and Service Act of 1940, as amended, were liquidated on or before May 30, 1947.

The members of Local Board No. 65, Manhattan, New York County, New York City, defendants in the above entitled action, received, individually, a Certificate of Service, terminating their services as members of such local board and the Selective Service System, on May 29, 1947.

Sincerely yours,

(S) LEWIS B. HERSHEY,

Director.

Enclosures.